STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 4, 2011
v	No. 295534 Wayne Circuit Court
DEREK TERRELL WORTHY, Defendant-Appellant.	LC No. 09-013374-FC

Before: DONOFRIO, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

A jury convicted defendant of aiding and abetting second-degree murder, MCL 750.317, and first-degree home invasion, MCL 750.110a(2).[1] The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 720 months to 1440 months for the second-degree murder conviction and 180 months to 480 months for the first-degree home invasion convictions. Defendant appeals as of right. We affirm.

This case arises from the killing of Gary Gagnon. Matthew Williamson testified, pursuant to a plea agreement, that he was friends with Gagnon's nephew, Michael Shaleen,[2] and had been to Gagnon's home many times. He believed that Gagnon kept jewelry and valuables in his home. Williamson identified defendant as the person he knew as "T," his heroin supplier. Williamson testified that he concocted a plan to get some money by robbing Gagnon. He called defendant on his cell phone at approximately 4:00 p.m. on March 29, 2009, and asked him if he would go with him, or if he knew of anyone who would go with him, who would intimidate Gagnon so that he would give up his items without a fight. Defendant called Williamson back approximately ½ hour later and indicated that he had found someone who would go with Williamson. They arranged to meet at a gas station at Plymouth and Schoolcraft in Livonia. At

[1] Defendant and co-defendant Seneca Hale were tried at the same time, but with separate juries. Another co-defendant, Matthew Williamson, pleaded guilty of second-degree murder as part of a plea agreement.

[2] The nephew's name is spelled various ways throughout the trial transcript.

that location, a man got out of defendant's car and jumped into Williamson's Blazer. Williamson did not know the man, who identified himself as "Mike." Williamson identified ""Mike" in the courtroom as co-defendant Seneca Hale. As Williamson and Hale drove to Gagnon's home, they discussed what they were going to do. Defendant followed in his car from the gas station to Gagnon's home on Roberts Street. Williamson pulled into the driveway, and defendant kept driving around.

Williamson knocked on Gagnon's door and was let inside. A few minutes later, Hale came in and struck Gagnon in the head with a gun and ordered both men to get down on the ground. Hale then told the men to go to the back bedroom. Hale pointed the gun at Gagnon. Hale then threw stuff around before asking Gagnon for his jewelry. Gagnon indicated he had gotten rid of it.

The men next went to the basement, where Hale ripped a cord from an iron and tied it loosely around Gagnon's hands. Next they went to the living room, where Hale grabbed a TV and put it by the front door. Williamson and Hale took some of Gagnon's property out to the Blazer. While they were inside the house, defendant was calling Hale's phone and telling him that they "were taking too long."

Hale asked Gagnon if he had anything in his wallet. Gagnon stated that he had an ATM card, and Hale indicated that Gagnon was "coming with them." Defendant called Williamson and asked where they were going next.

Williamson parked his vehicle on the street and Hale told him to go to the ATM. Williamson said no, but Gagnon said, "Just go." Gagnon provided his PIN number. Williamson went up to the ATM, but "messed up" a couple times. He then went to a drive-up ATM where he obtained $200, then another $200. While there, he saw defendant driving down the street. Williamson went back to the vehicle and told Hale he had $400. Hale instructed him to go to another ATM. Williamson obtained $60 from an ATM at a gas station. He then unsuccessfully attempted to get money from an ATM at a liquor store. Williamson next drove to the gas station and purchased gas with Gagnon's credit card.

Hale then told Williamson to drive to St. Mary's Street in Detroit. Defendant again called and asked what they were doing. Williamson told defendant where they were, and then saw defendant driving up and down the street. Williamson drove to the corner of St. Mary's Street and Wadsworth. Hale and Gagnon got out of the vehicle. Hale said he was going to go in the house at that location and tie Gagnon up. Defendant then called Williamson and told him that "the ol' boy wants you in the house." Williamson went into the house and saw Hale by a side door leading to a landing and stairs. Williamson could hear a "snoring" sound coming from the basement. Hale attempted to hand Williamson a .12 gauge gun and said, "Shoot him." Williamson had never seen the gun before. Williamson told Hale no. Hale reached in the pocket of his hoodie, grabbed something shiny, and went downstairs. Williamson could hear hitting and scuffling. He went downstairs and saw Gagnon leaning against the wall. Williamson grabbed Gagnon and laid him down, then held his head and told him, "Sorry, this wasn't supposed to happen." According to Williamson, he probably left bloody shoeprints as he left the house. He was wearing Adidas shoes with a herringbone pattern on the sole.

Williamson went to his vehicle. Hale then followed and said, "He's dead." Hale stated that he had called defendant and that defendant wanted to meet up. Williamson followed defendant and parked at the corner of Wadsworth. They put Gagnon's TV's and laptop in defendant's car. Defendant then slammed Williamson up against the side of his car and pointed a .12 gauge gun at him and said, "I know where your people live." Hale left with defendant.

Williamson then went to his girlfriend, Mary Wolverton's, house to take a shower and have her wash his clothes. The next morning, defendant called Williamson and told him to burn down the Roberts Street house. Defendant also told him to burn down the St. Mary's Street house.

On April 2, Williamson learned that video of him at the ATM was on the news. Williamson threw out the clothes and shoes he was wearing the night of the robbery. He called defendant and arranged to meet him at Target by Westland Mall. He eventually met up with defendant near some apartments. He got into defendant's car and told him he was going to turn himself in. Defendant warned him not to mention him. Williamson was arrested the next morning by the Livonia police as he was sleeping in his car at a rest stop along I-94. Williamson testified that the first two statements he gave to police were not truthful, but he told the truth in the third statement. He originally did not mention the others involved because he did want to get them in trouble, but once he was confronted with phone records he told the truth. He admitted he saw Gagnon get stabbed with a knife and that he was involved.

Livonia Police Sergeant Michael Bremenour testified that the shoeprints left at both the Roberts Street and St. Mary's Street locations appeared to be the same herringbone pattern. The shoes he received from Williamson had the same pattern as the shoeprints found at both locations.

Detective-Sergeant Shelly Holloway testified that phone records revealed that defendant appeared to be the "middle man" and that Williamson's third statement was corroborated by phone records. A number of short conversations took place between 6:30 p.m. and 10:00 p.m. between Williamson and defendant and between defendant and Hale.

John Haehnig, a senior inspector for the U.S. Marshal Service, analyzed the phone records for all three individuals involved and the cell phone towers that were "hit" during the phone calls. Between 6:00 p.m. and 8:17 p.m. on March 29, calls took place between defendant's phone and Williamson and Hale. The calls "hit" on a tower that was 8/10 of a mile from the Roberts Street address. Between 8:49 p.m. and 9:31 p.m., calls took place between defendant's phone and Hale and Williamson, and these calls "hit" on a tower in the vicinity of the ATMs involved in this case. At approximately 10:00 p.m., defendant's phone was "hitting" on a tower in the vicinity of the St. Mary's Street address. The records indicated that on April 2, both defendant's and Williamson's phones were in the same area in Westland. In sum, the records indicated that at each of the crime locations defendant's phone was hitting off the closest cell tower to each of these locations. On April 4, 2009, both defendant's and Hale's cell phone numbers were changed.

Mary Wolverton testified that Williamson came to her house on March 29 and asked her to wash his clothes and shoes. There was blood on his shoes and a little bit of blood on his pants.

Williamson stated that he had kicked somebody with his feet. Williamson picked his clothes up the next day, and his shoes a few days later. He discarded his shoes in the parking lot of her workplace. Williamson indicated to her that the robbery had "gone wrong" and that they "had a fight." Williamson had mentioned something about a robbery a few weeks earlier and had indicated that "a guy" had $30,000 in cash and a lot of jewelry in his house.

The parties stipulated that the blood in the Blazer matched Williamson's blood, that hair samples belonged to Williamson, that the bloody prints found at the scene were similar to the known Adidas shoes belonging to Williamson, and that the blood on the left Adidas shoe matched Gagnon's blood.

I

Defendant argues that the evidence presented was insufficient to support his second-degree murder conviction as an aider and abettor. This Court reviews sufficiency of the evidence claims de novo, viewing the evidence in the light most favorable to the prosecution to determine if the evidence was sufficient for a rational jury to find the defendant guilty beyond a reasonable doubt. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).

"The elements of second-degree, or common-law, murder are (1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse, or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm [i.e., malice]." *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996) (quotation and citation omitted); MCL 750.317. A conviction of a defendant as an aider and abettor requires the prosecution to show "that [1] the crime was committed by the defendant or another, [2] that the defendant performed acts or gave encouragement that aided or assisted the commission of the crime, and [3] that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time the defendant gave the aid or assistance." *People v Jones*, 201 Mich App 449, 451; 506 NW2d 542 (1993). Regarding intent:

> a defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet. Therefore, the prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense. [*People v Robinson*, 475 Mich 1, 14-15; 715 NW2d 44 (2006).]

Viewing the evidence in the light most favorable to the prosecution, a reasonable jury could infer that defendant is liable for second-degree murder as an aider and abettor. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Contrary to defendant's suggestion, the evidence presented revealed that defendant did more than simply connect Williamson with Hale for the purpose of perpetrating a robbery. Viewed in the light most favorable to the prosecution, the evidence was sufficient to allow a reasonable jury to infer that defendant had knowledge that

Hale and Williamson's action went beyond the scope of a robbery and that they had the intent to inflict great bodily harm on, or to kill, Gagnon. The evidence revealed that, after contacting Williamson and telling him that he had found someone (Hale) to assist in the robbery, defendant drove Hale to meet Williamson. Defendant then followed Williamson and Hale to Gagnon's home. While Hale and Williamson were inside the home, defendant called Hale on a cell phone and told him they were "taking too long." After Hale and Williamson left Gagnon's house with Gagnon, defendant called Williamson to find out where they were going with Gagnon. Williamson subsequently parked his vehicle and then attempted to get money using Gagnon's ATM card. After Williamson left the vicinity of the ATMs in his vehicle, defendant again called Williamson and asked "what they were doing." Williamson told defendant where he and Hale were. Williamson parked his car at a house at the corner of St. Mary's Street and Wadsworth. He then observed defendant driving up and down the street. After Hale and Gagnon exited the vehicle, Hale told Williamson he was taking Gagnon inside to "tie him up." Defendant then called Williamson and told him that "The ol' boy wants you in the house." Inside, Hale handed Williamson a .12 gauge gun and told him to shoot Gagnon. After Gagnon was killed, Hale indicated that he had phoned defendant and that defendant wanted to "meet up." Williamson followed defendant's vehicle to a location at the corner of Wadsworth. Gagnon's TV and laptop were put into defendant's car. Defendant then slammed Williamson up against the side of his car and pointed a .12 gauge gun at him while stating, "I know where your people live." Defendant then left with Hale. Evidence was presented that defendant's cell phone was in the vicinity of Roberts Street, the ATMs, and St. Mary's Street, at the respective times that activity related to these crimes occurred at each location. Evidence was also presented that defendant pointed the same type of gun at Williamson that had been produced by Hale in an attempt to have Williamson shoot Gagnon.

From this evidence, a reasonable jury could infer that defendant assisted Hale and Williamson in killing Gagnon with the knowledge of their intended actions. Given the circumstances that occurred after the home invasion, it was reasonable for the jury to infer that defendant performed acts that aided and abetted the crime and that defendant knew that Hale or Williamson intended to either do great bodily harm or kill Gagnon when they took him to the abandoned house after stealing his property and his money. Therefore, sufficient evidence existed to support defendant's conviction.

II

Defendant asserts that the trial court failed to define great bodily harm as part of the definition of malice for second-degree murder. Because defendant did not object to the trial court's instructions on this basis, or request an instruction defining great bodily harm, this issue is not preserved. Therefore, this unpreserved claim of instructional error is reviewed for plain error affecting defendant's substantial rights. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

"[I]nstructions must include all elements of the charged offense and any material issues, defenses, and theories if supported by the evidence." *People v McGhee*, 268 Mich App at 606. When a word is not defined by statute, this Court will presume that the word is subject to ordinary interpretation and there is no error requiring reversal when the trial court "fails 'to define a term which is generally familiar to lay persons and is susceptible of ordinary

comprehension.'" *People v Knapp*, 244 Mich App 361, 376-377; 624 NW2d 227 (2001), quoting *People v Cousins*, 139 Mich App 583, 593; 363 NW2d 285 (1984). The phrase "great bodily harm" is generally familiar to laypersons and it is one of common understanding. Because the trial court provided all the elements of second-degree murder to the jury, and the phrase "great bodily harm" is generally familiar to laypersons and is one of common understanding, defendant has not established plain error affecting his substantial rights.[3]

III

Defendant challenges the trial court's scoring of offense variables 5, 7, and 8 of the sentencing guidelines. Defendant did not object to the scoring of any of the Offense Variables at sentencing. However, defendant raised the issues in a motion to remand and, therefore, we consider the issue as preserved for appellate review. MCL 6.429(C); MCL 769.34(10). This Court reviews the scoring to determine "whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

The trial court scored the guidelines for defendant's second-degree murder conviction. A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision for which there is any evidence in support will be upheld. *Id.* Thus, this Court reviews the scoring to determine "whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score. *McLaughlin*, 258 Mich App at 671. Findings of fact at sentencing are reviewed for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

Defendant asserts that the trial court erred in scoring 15 points for OV 5. A score of 15 points for OV 5 (psychological injury to a member of a victim's family) is appropriate where there is serious psychological injury to a member of Gagnon's family that may require professional treatment. MCL 777.35(1). Notably, whether the family member has sought treatment is not conclusive to this determination. MCL 777.35(2).

The record evidence reveals that Gagnon's two minor great-nephews and their mother generally talked to Gagnon every day or every other day. The boys, whose father was incarcerated, would spend every weekend at Gagnon's home and that they kept all of their toys at his house. The boys referred to Gagnon as "Papa Gary." The Victim's Impact Statement in the PSIR indicates that Gagnon's sister, Diana Knapp, had recently had surgery and was told that she could bring her victim's impact statement to sentencing. The sentencing transcript reveals

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[3] This Court has so held in *People v Davis*, unpublished per curiam opinion of the Court of Appeals, Docket No. 282185 (issued April 20, 1010); *People v Smith*, unpublished per curiam opinion of the Court of Appeals, Docket No. 288519 (issued March 4, 2010); *People v Long*, unpublished per curiam opinion of the Court of Appeals, Docket No. 286779 (issued December 17, 2009).

that Knapp did not wish to address the court at sentencing, but that the Court did hear from her "and other members of the victim's family" "in the other sentencing proceeding[4] and they do intend to send a letter with regard to Mr. Worthy." The record does not reveal what the family members stated at "the other sentencing proceeding" or whether the letter referred to with regard to defendant was ever sent to the court. Had defendant objected to the scoring of OV 5, clearly these issues could have been addressed at sentencing. Nonetheless, it is reasonable to infer that the minor children, as well as the children's mother and Gagnon's sister, suffered serious psychological injury that may require professional treatment. The record supports the trial court's scoring of OV 5.

Defendant also asserts that the trial court erred in scoring OV 7. MCL 777.37 provides as follows:

> (1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) A victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense ….. 50 points
>
> (b) No victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense ….. 0 points
>
> (2) Count each person who was placed in danger of injury or loss of life as a victim.
>
> (3) As used in this section, "sadism" means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification.

The trial court scored OV 7 at 50 points because defendant was convicted on an aiding and abetting theory. There is no dispute that defendant was not present when Gagnon was killed. At no time did defendant take part in killing Gagnon.

In *People v Hunt*,___ Mich App ___; ___ NW2d ___ (Docket No. 292639, issued October 19, 2010), the defendant had a gun at various points throughout the crime, but at no time took part in tying up Gagnon, beating Gagnon, firing a weapon, or encouraging the others involved in the crime in performing these acts. This Court opined with regarding to the scoring of OV 7 with regard to the defendant:

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[4] We assume that "the other sentencing proceeding" was Williamson's sentencing.

> Cases upholding scores of 50 points for OV 7 are distinguishable, because they involve specific acts of sadism, torture, or excessively brutal acts *by the defendant*. In *People v Wilson*, 265 Mich App 386, 396-398; 695 NW2d 351 (2005), the defendant was convicted of assault with intent to commit great bodily harm less than murder for inflicting a prolonged and severe beating that left lasting and serious effects. The defendant in that case choked the victim a number of times, cut her, dragged her, and kicked her in the head. After her hospital stay, the victim was in a wheelchair for three weeks and used a cane for another three weeks. Another case where OV 7 was scored at 50 points is *People v Mattoon*, 271 Mich App 275, 276; 721 NW2d 269 (2006) and after remand, *People v Mattoon*, unpublished opinion per curiam of the Court of Appeals, issued 10/18/07 (Docket No. 272549). In *Mattoon*, the defendant was convicted of kidnapping, felonious assault, and felony firearm. He held the victim at gunpoint for nine hours, made her look down the barrel of a gun, repeatedly threatened to kill her and himself, and asked her what her son would feel like when he saw yellow crime tape around his mother's house. Similarly, in *People v Hornsby*, 251 Mich App 462, 468-469; 650 NW2d 700 (2002), the defendant pointed a gun at the victim, cocked it, and repeatedly threatened the victim and others in the store. In *People v Kegler*, 268 Mich App 187, 189-190; 706 NW2d 744 (2005), the defendant removed the victim's clothes, assisted with carrying him naked outside, and admitted that she wanted to humiliate him by leaving him outside naked. In *People v James*, 267 Mich App 675, 680; 705 NW2d 724, (2005), the defendant repeatedly stomped on the victim's face and chest and deprived the victim of oxygen for several minutes causing the victim to sustain brain damage and remain comatose. And, in *People v Horn*, 279 Mich App 31, 46-48; 755 NW2d 212 (2008), the defendant terrorized and abused his wife with recurring and escalating acts of violence including threatening to kill her.
>
> Unlike those cases, while defendant was present and armed during the commission of the crimes, he did not himself commit, take part in, or encourage others to commit acts constituting "sadism, torture, or excessive brutality" under OV 7. Moreover, unlike OV 1, OV 2, and OV 3, OV 7 does not state that "in cases involving multiple offenders, if one offender is assessed points" ... "all offenders must be assessed the same number of points." MCL 777.31(2)(b), MCL 777.32(2), MCL 777.33(2)(a). For OV 7, only the defendant's actual participation should be scored. Here, the record reflects that defendant's actions alone do not qualify as "sadism, torture, or excessive brutality" under OV 7.

In light of *Hunt*, the trial court erred by scoring 50 points for OV 7 where defendant himself performed no acts that qualify as "sadism, torture, or excessive brutality".

A scoring adjustment of OV 7 down from 50 points to zero points will not change defendant's sentencing guidelines range. Without the 50 point score on OV 7, defendant's score

remains F-III[5] on the M2 grid and the guideline range is unchanged and resentencing is unnecessary. Resentencing is not required when the correction of an erroneous score does not result in a different sentencing range. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Finally, defendant contends that the trial court erred in scoring OV 8. The trial court scored 15 points for OV 8, which is appropriate when a victim is asported to another place or situation of greater danger or was held captive beyond the time necessary to commit the offense. MCL 777.38(1)(a). Similar to the argument made above with regard to OV 7, defendant asserts that he did not directly engage in the conduct that led to the scoring decision and that OV 8 is not to be scored the same for all offenders when multiple offenders are involved.

As noted above, defendant's reasoning has been overruled with regard to OV 7 by this Court's decision in *Hunt.* Because OV 8, like OV 7, contains no language requiring multiple offenders to be similarly scored, it is logical to employ the same reasoning and analysis to OV 8. We therefore follow *Hunt* and conclude that the trial court erred by scoring 15 points for OV 8. Even with a reduction of an additional 15 points in the OV score, however, defendant's score remains F-III on the M2 grid and the guideline range is unchanged. As noted above, resentencing is therefore not necessary. *Francisco,* 474 Mich at 89 n 8.

Affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald

[5] PRV of 75 (Level F) and OV of 125 (Level III) *after* the correction to OV 7.